10/26/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
FLORIDA DEPARTMENT OF TRANSPORTATION -- FAIRBANKS BORROW PIT,	)	[RCRA] Docket No. 92-16-R
	)	
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION TO QUASH REQUEST FOR INFORMATION AND FOR PROTECTIVE ORDER

The Environmental Protection Agency (EPA or complainant) on August 20, 1992 filed a complaint under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, and the Florida Resource Recovery and Management Act, Florida Statutes §§ 403.701-730. Complainant seeks the imposition of civil penalties pursuant to section 3008 of RCRA, 42 U.S.C. § 6928(a), for alleged violations of regulations promulgated under RCRA and those set out in the Florida Administrative Code, Chapter 17-730, 40 C.F.R. Parts 260-270, adopted by reference.

Pursuant to section 3007 of RCRA, 42 U.S.C. § 6927, and section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9604(e), complainant sought information from respondent. Some of the information requests apparently preceded the complaint. Other information requests by complainant were subsequent to the complaint. The core of contention is the latter.

For the reasons stated in its motion served May 26, 1993, respondent seeks an order quashing complainant's request for information pursuant to section 3007 of RCRA and section 104(e) of CERCLA. Complainant served a response in opposition to the motion on June 7.[1] Respondent's reply followed on June 28 and complainant's surresponse was served on July 12. The arguments of the parties are known to them. They will not be repeated here except to the extent deemed necessary by the undersigned Administrative Law Judge (ALJ).

Respondent contends that, against the history of the case, "the information request cannot be objectively read as anything other than discovery in this matter governed by the Consolidated Rules of Practice." (Motion at 2.) Respondent supports this position by noting the similarities between the facts sought in the information requests and the various counts of the complaint that would plainly be served by bringing them forward in this proceeding. Indeed, this "discovery" troubles respondent in that the information complainant seeks is information it ostensibly needed in order to file a complaint in the first place. (Motion at 4.)

Complainant contends that the Consolidated Rules of Practice (Rules), 40 C.F.R. Part 22, do not limit its authority to issue information requests following the filing of a complaint in a judicial or administrative proceeding. Moreover, complainant alleges that respondent was less than fully responsive to its prior

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[1] Unless otherwise shown, all dates are for the year 1993.

information requests. Respondent asserts that at the time the complaint was served complainant did not have a basis to support the pleading, and that the latter was attempting to resuscitate an otherwise defective complaint by seeking information.

It cannot be assumed that no basis for a complaint exists because a complainant seeks additional information subsequent to the filing of that pleading. Indeed, complainant has effectively laid respondent's claim to rest, and has made a persuasive argument that at the time its complaint was filed it had a prima facie case. (Surresponse at 2.) It is admitted that EPA continued its investigation subsequent to the filing of the complaint. Based on additional information, continuing investigations, and review of respondent's submitted documents, complainant determined that response to the first information request may not have been complete; that additional violations may have been committed; and that the other violations may have occurred at the landfills which received wastes from the respondent's Fairbanks Borrow Pit. Complainant argues stoutly that it is not foreclosed by the Rules from using another route to procure information. To support its position, complainant has cited various cases, both judicial and administrative, to justify its information requests.

In this proceeding, complainant may seek to obtain additional information under section 22.19(f) of the Rules. However, under the related facts, complainant cannot be compelled to do so, no more than respondent be precluded from filing a Freedom of Information Act request. The ALJ finds no reason either to quash

the information request or to issue a protective order, as EPA's enforcement responsibilities do not end when a complaint has issued.

At this point, it may be appropriate to visit In the Matter of Del-Val Ink and Color, Inc., II RCRA-91-0104 (Jan. 12, 1993). In that case, five months after the filing of amended prehearing exchanges, complainant moved for further discovery because "'the documentation provided by Respondent to Complainant on these issues has been incomplete and contains a number of significant internal inconsistencies. Complainant therefore has been unable to assess Respondent's management and disposal of its hazardous waste.'" Id. at 2. This motion was denied. Complainant then requested information from S&W Waste, a company which handled various aspects of Del-Val's waste management, pursuant to RCRA section 3007(a). Respondent moved for an order to dismiss the complaint for abuse of prosecutorial discretion and to enjoin the EPA from obtaining certain documents from S&W Waste. Respondent asserted, inter alia, that complainant was bypassing the Rules and circumventing the order denying discovery. Complainant's position was that it honored the order and that it had not sought information for which a privilege existed. Chief Administrative Law Judge Frazier agreed. EPA may issue demands for information to section 3007 during the pendency of a proceeding. Such a request is not prosecutorial abuse.

Though Judge Frazier needed only to deal with a request of information from a non-party, his conclusion is not exclusive to

non-parties. Having the issue of an information request to an adverse party, pursuant to 3007(a), squarely before this forum, the ALJ concludes that here too he is "without authority to enjoin such action." Id. at 7, Citing In re Coors Brewing Co., RCRA-VIII-90-90, and In re Stanley Plating Co., Inc. (Stanley), 637 F. Supp. 71-72 (D. Conn. 1986).

EPA's enforcement responsibilities do not end when a complaint has been filed. Indeed, it would be shirking its responsibility to the public if it ceased investigations every time it filed a complaint. The fact that possible violations have been identified does not imply that a facility is otherwise in compliance with the requirements of RCRA or CERCLA. Suspension of information gathering activities during the life of a proceeding could ostensibly wreak environmental havoc.

Complainant also cites Stanley to support the proposition that it is able to seek information during the pendency of an administrative action. There, respondent asserted that a search warrant issued after the initiation of an enforcement action was improper and that the warrant should be quashed. The proper procedure, according to respondent there, would have been the filing of a motion to inspect under Fed. R. Civ. P. 34(b). Rejecting this contention, it was held that "[t]he purposes of Rule 34 and § 6927 are different. Though they may overlap, they are not preclusive." (Stanley at 72.) However, Stanley continues to

indicate that "[t]hey may lead to separate enforcement procedures." The question of the use of 3007(a) materials as evidence was apparently left open by that court. The obtaining of information under section 3007 is one issue. Whether or not same is admissible as evidence in a hearing is another question.

Thus, we come directly to the complainant's assertion "[n]othing in the statutes or rules require EPA to have completed its investigations or know every last detail or fact about a facility's compliance with RCRA prior to filing a complaint." (Resp. to Motion at 16.) The ALJ agrees. Nothing does. The ALJ concurs further with complainant's position that while some of the information requested may be related to counts already in the complaint, it may seek and obtain information under the authority of section 3007 of RCRA and section 104(e) of CERCLA. If respondent is of a mind that complainant is exceeding its statutory authority by frequent requests for information, it may, of course, defend any enforcement action on that basis.

IT IS ORDERED that:

1. Respondent's motion to quash complainant's request for information or, in the alternative, issue a protective order be **DENIED**.

2. In the event this matter is not settled within 30 days from the service date of this order, complainant shall make arrangements for a telephone prehearing conference between the parties and the ALJ for the purpose of setting a hearing date.

Frank W. Vanderheyden
Administrative Law Judge

Dated: October 26, 1993

IN THE MATTER OF FLORIDA DEPARTMENT OF TRANSPORTATION -- FAIRBANKS BORROW PIT, Respondent,
[RCRA] Docket No. 92-16-R

Certificate of Service

I certify that the foregoing Order, dated 10/26/93, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

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Marion Walzel
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Legal Staff Assistant

Dated: Oct. 29, 1993